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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA

13 STEPHEN KNIGHT LEWIS,

14 Plaintiff,

15 v.

16 STATE OF WASHINGTON DEPARTMENT
17 OF CORRECTIONS, *et al.*,

18 Defendants.

19 No. 08-5523FDB/JRC

20 ORDER ON PENDING MOTIONS

21 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned
22 Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local
23 Magistrate Judges' Rules MJR 1, MJR 3, and MJR 4. The Honorable Magistrate Judge Arnold
24 has taken recall status and this action has been reassigned.

25 This action involves plaintiffs claim that he has improperly been classified as a level II
26 sex offender. Plaintiff originally filed a complaint that named the State of Washington, the
Department of Corrections, and counselor John Doe Clark of Larch Corrections Facility. (Dkt. #

ORDER - 1

1 4). The Court filed the complaint on September 11, 2008 (Dkt. # 4). Plaintiff did not provide
2 copies of the complaint or filled out service forms. He was ordered to provide those documents
3 prior to the Court ordering the United States Marshal's attempt service by mail (Dkt # 5).

4 It appears plaintiff then altered his original complaint by filing amended complaints for
5 service. Plaintiff did not inform the court he was amending his original complaint and did not
6 file a copy of the amended complaint with the Court as a separate filing. According to the State
7 of Washington Department of Corrections, the named defendants in the amended complaint are
8 the State of Washington Department of Corrections, a John Doe counselor, and the Pierce
9 County Sheriff's Office (Dkt. # 16). The appearance of the Pierce County Sheriff's Office in this
10 action supports defendant's contentions (Dkt. # 8 and 13).

12 No motion or pleading was placed before the Court for consideration until the
13 Washington State Department of Corrections filed a motion to dismiss (Dkt # 19). Pierce
14 County has joined in that motion (Dkt. # 20). Plaintiff has filed what the Court would consider
15 to be a motion to amend the complaint in the form of a proposed order granting leave to amend
16 and a motion for appointment of counsel (Dkt. # 26 and 27).

18 The Court will first address whether plaintiff may amend his complaint prior to deciding
19 the defendant's motion to dismiss. The court will then address the motion for appointment of
20 counsel.

21 Motion to Amend Complaint. The original complaint in this action was never served on
22 any defendant, despite the instruction by the court. Apparently, plaintiff instead delivered an
23 unfiled amended complaint to the Marshall's office, which was then delivered by the Marshall's
24 office to the various defendants, including a new "defendant" – the Pierce County Sheriff's
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1 Department. The defendant's motion to dismiss is in response to an amended complaint that is
2 not yet properly before the Court.

3 No defendant has yet answered either the original complaint or the proposed amended
4 complaint. Leave to amend a complaint is not needed prior to an answer being filed. Fed. R.
5 Civ. P. 15 (a). Therefore, the Court will **GRANT** plaintiff's motion to amend the complaint (Dkt
6 # 26). The operative complaint in this action is now the proposed amended complaint attached
7 to plaintiff's motion (Dkt. # 26, attached proposed complaint).

8 As it is unclear to the Court whether this is the same amended complaint served on
9 defendants, it is further **ORDERED** that defendants advise the Court by April 17, 2009 whether
10 they wish to refile their motion to dismiss or whether they wish the Court to consider their
11 motion to dismiss as applied to the amended complaint. The court will then order new dates for
12 responses and replies.

13 **Motion to Appoint Counsel**. The remaining motion is plaintiff's motion for appointment
14 of counsel. There is no right to have counsel appointed in cases brought under 42 U.S.C. § 1983.
15 Although the court, under 28 U.S.C. § 1915(e) (1), can request counsel to represent a party, the
16 court may do so only in exceptional circumstances. Wilborn v. Escalderon, 789 F.2d 1328, 1331
17 (9th Cir. 1986); Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984); Aldabe v. Aldabe, 616
18 F.2d 1089 (9th Cir. 1980). A finding of exceptional circumstances requires an evaluation of both
19 the likelihood of success on the merits and the ability of the plaintiff to articulate his claims *pro
20 se* in light of the complexity of the legal issues involved. Wilborn, 789 F.2d at 1331.

21 Plaintiff has demonstrated an adequate ability to articulate his claims *pro se*. See
22 amended, Complaint (Dkt # 26). The likelihood of success on the merits does not favor
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1 appointment of counsel at this point in time. Accordingly, Plaintiff's Motion to Appoint Counsel
2 (Dkt. # 27) is **DENIED**.

3 The clerk of court is directed to send copies of this order to Plaintiff. The clerk's office
4 should remove Dkt. # 19, 20, 26, and 27, from the Court's calendar. Further, the clerk's office is
5 directed to note May 1, 2009, due date for service documents.
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8 DATED this 3rd day of April, 2009.

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J. Richard Creatura
United States Magistrate Judge
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